

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE:

CASE NO.: 09-3529-3F3

JACQUES D. PERREAULT,
Debtor.

_____/ **RUTHERFORD MULHALL, P.A.**

Plaintiff,

v.

Adversary No.: 09-391

JACQUES D. PERREAULT,
Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES

This proceeding came before the Court upon Defendant's Motion for Attorney's Fees, Plaintiff's Response in Opposition to Defendant's Motion for Attorney's Fees, and Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Motion for Attorney's Fees. Upon a review of the pleadings, the Court finds it appropriate to grant in part Defendant's Motion for Attorney's Fees.

Background

On August 4, 2009 Plaintiff filed a Complaint Objecting to Dischargeability of a Debt. Plaintiff previously represented Defendant in a marital dissolution proceeding. Pursuant to that representation Plaintiff and Defendant entered into a Standard Service and Retainer Agreement (the "Retainer Agreement"). The Retainer Agreement included certain "Standard Provisions". Paragraph 19 of the Standard Provisions provides that Florida law applies to the retainer agreement. Paragraph 16 of the Standard Provisions relates to attorney's fees and provides in relevant part:

Collection of Fees and Costs

In the event it is necessary to institute suit for the collection of fees and costs due the Firm by Client, Client will pay, in addition to such fees and advances, all expenses necessitated thereby, including reasonable attorney's fees and court costs. In the event the Firm utilizes its attorneys to perform collection services, the Firm will be entitled to its prevailing rates for legal services and costs incurred

The Complaint alleged that Defendant had incurred approximately \$32,000.00 in outstanding and unpaid legal fees and costs. The Complaint alleged that as an inducement to Plaintiff to continue its representation of Defendant, Defendant executed a secured promissory note (the "Note") by which he acknowledged the outstanding debt and agreed to pay it along with the costs and fees he expected to incur as the result of Plaintiff's continued representation of him. The Complaint alleged that Plaintiff continued to represent Defendant based upon his representations as evidenced by the Note.

The Note provides in Section 11 that it "shall be governed by, and construed and enforced in accordance with, the laws of the state of Florida." The Note also contains a provision related to attorney's fees. Section 8 of the Note provides in relevant part:

Attorney's Fees

If this note is placed in the hands of an attorney for collection, including any attorney employed directly by [Plaintiff], [Defendant] promises to pay [Plaintiff]'s costs, disbursements and attorney's fees incurred in connection therewith, including those incurred for appellate, bankruptcy, or administrative proceedings.

The Complaint sought to except Defendant's debt to Plaintiff from Defendant's discharge pursuant to 11 U.S.C. § 523(a)(2).

On August 17, 2009 Defendant filed Motion to Dismiss Plaintiff's Complaint Objecting to Dischargeability of a Debt (the "Motion to Dismiss") essentially alleging that: 1) the § 523 count should be bifurcated into separate counts under § 523(a)(2)(A) and (A)(2)(B); and 2) the Complaint

alleged to plead fraud with particularity. Plaintiff failed to file a response to the Motion to Dismiss. On October 5, 2009, based upon Plaintiff's failure to file a response to the Motion to Dismiss, the Court entered an Order Dismissing the Adversary Proceeding (the "Dismissal Order"). Thereafter Defendant filed the Motion for Attorney's Fees, Plaintiff filed the Response, and Defendant filed the Reply.

Discussion

Defendant asserts that pursuant to the above provisions in the Retainer Agreement and Note, he is entitled to an award of attorney's fees against Plaintiff pursuant to Fla. Stat. § 57.105(7), Florida's attorney's fee reciprocity statute. Section 57.105(7) provides:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Relying on Barnett Bank of Tampa, N.A. v. Maestrelli (in re Maestrelli), 172 B.R. 368 (Bankr. M.D. Fla. 1994), Plaintiff asserts that § 57.105(7) does not apply to this proceeding. In that case the court determined that an award under § 57.105 was not proper in a § 523 proceeding as it "is not a contract case to begin with, but rather a proceeding to determine dischargeability vel non of an obligation of Debtor to the Plaintiff, albeit the obligation had its genesis in a contract." Id. at 371. Plaintiff asserts that this adversary proceeding was not a contract action and that it attached the underlying agreement only to evidence the existence of a debt, not as a basis for the cause of action. The Eleventh Circuit Court of Appeals flatly rejected Maestrelli's holding in Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286 (11th Cir. 2005). In that case the court held that "a prevailing debtor in a dischargeability action brought by his creditor can recover his attorney's fees and costs incurred in those dischargeability proceedings if recovery of such are due under an enforceable contractual

right, such as a statutory reciprocal attorney's fee provision, provided for by state law." Id. at 1288.¹

Alternatively, Plaintiff argues that an award under § 57.105(7) is discretionary, pointing to the language in the statute that "a court may allow reasonable attorney's fees." However, the court in Landry v. Countrywide Home Loans, Inc., 731 So. 2d 137,140 (Fla. 1st Dist. Ct. App.1999) (internal citation omitted) held that once the prevailing party determination has been made, an award of attorney's fees pursuant to the reciprocity statute is mandatory.² See also In re Full Gospel Assembly, 371 B.R. 559, 562-63 (Bankr. S.D. Fla. 2007)(recognizing that Florida law requires an award of attorney's fees under reciprocity statute once prevailing party determination has been made).

In light of the fact that § 57.105(7) applies to dischargeability actions and Defendant is the prevailing party in this action, Defendant is entitled to an award of attorney's fees incurred in defending this adversary proceeding.³ The Court turns to the issue of the reasonableness of the fees.

Defendant seeks an award of \$6,062,50. In determining whether an attorney's fee is reasonable, a court must determine the lodestar, the product of the number of hours reasonably expended and a reasonable hourly rate. Grant v. Schumann Tire & Battery Co., 908 F.2d 874, 877 (11th Cir. 1990) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The calculation of the reasonableness of the rates and hours should take into account the following factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974): (1) the time and

¹ At that time current section 57.105(7) was numbered 57.105(6).

² At that time current section 57.105(7) was numbered 57.105(2).

labor required, (2) the novelty and difficulty of the legal questions, (3) the skill required to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. Blum v. Stenson, 465 U.S. 886, 895-896 n.11 (1984). The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with the prevailing market rate. NAACP v. City of Evergreen, 812 F.2d 1332, 1338 (11th Cir. 1987). The Court finds that \$275.00 is a reasonable hourly rate for Andrew J. Decker, III and \$225.00 is a reasonable hourly rate for Andrew J. Decker, IV. The Court finds that an appropriate award of attorney's fees in this matter is \$3,450.00 representing six hours by Andrew J. Decker, III and 8 hours by Andrew J. Decker, IV. Upon the foregoing, it is

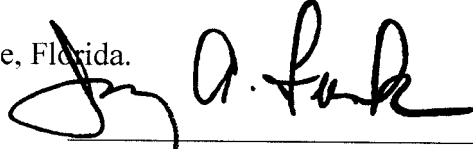
ORDERED:

1. Defendant's Motion for Attorney's Fees is granted.
2. Defendant is awarded \$3,450.00 toward his attorney's fees owed to the Decker Law Firm, P.A. for the defense of this adversary proceeding.
3. Plaintiff shall pay \$3,450.00 to Defendant within ten days of the date of this Order.
4. The Court reserves jurisdiction to enforce Paragraph 3 on proper motion

³ Although Defendant also sought attorney's fees pursuant to 11 U.S.C. § 523(d), because the Court found that Defendant was entitled to an award of attorney's fees pursuant to § 57.105(7), the Court need not address Defendant's entitlement pursuant to § 523(d).

and notice.

DATED March 17, 2010 in Jacksonville, Florida.



Jerry A. Funk

United States Bankruptcy Judge

Copies to:

Robert L. Wunker, Attorney for Plaintiff

Andrew J. Decker, III, Attorney for Defendant

RECORDED IN THE US BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION
J.B. VOL. 53, NO. 7349